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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 676

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC.,

Appellant,

vs.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 676

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., A CORPORATION, ET AL.,

Appellants,

vs.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.,

URICH'S SERVE YOURSELF STATIONS, INCORPORATED, A CALIFORNIA CORPORATION, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of California entered in this cause.

Opinion Below

The opinion of the Supreme Court of California is reported at 39 California 813; 249 Pacific (2d) 545. The opinion of the District Court of Appeal of the State of Cali-

fornia, Second Appellate District, Division II, is reported in 241 Pacific (2nd) 593. Copies of these opinions are attached hereto as Appendix A.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on October 31, 1952. A petition for appeal was presented to Mr. Justice Douglas on January 29, 1953. This case at its inception was an action to enjoin the enforcement of the hereinafter cited provisions of the Business and Professions Code of the State of California on the grounds that they were violative of the United States Constitution. The trial court held the statutes valid and refused to enjoin the enforcement of them against plaintiffs, appellants herein. The District Court of Appeals reversed the trial court and finally the Supreme Court of the State reversed the District Court of Appeals, and affirmed the judgment of the trial court. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182; *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94; *Western Turf Association* v. *Greenburg*, 204 U. S. 359.

In satisfaction of Rule 12(1) of the Rules of the United States Supreme Court appellant calls to the court's attention the fact that the unconstitutionality of the statutes in issue here was first raised by the original complaint and petition for injunction filed in the trial court. The complaint alleged the statutes were violative of the United States Constitution and prayed that their enforcement and application to plaintiff-appellants be enjoined, and as a

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deprivation of plaintiff-appellant's valuable property rights without due process of law.

The matter was presented to the trial court on stipulated facts, and the court entered a judgment denying an injunction and declaring that the statutes were valid and constitutional.

The first paragraph of the judgment of the trial court read as follows: "That Sections 20880, 20882, 20883, 20884, 20885 and 20886, Business and Professions Code, are and each of them is proper, expedient, and constitutional in the regulation of advertising of price at which gasoline or other motor vehicle fuel is sold or offered for sale upon or near the premises of any place of business in the State of California."

Question Presented

Is a statute which prohibits a service station operator from displaying a sign which reads "Serve Yourself and Save", which sign tells the truth, an arbitrary, unreasonable, unnecessary and special law, and an unnecessary exercise of the police power which takes property without due process of law?

Statutes Involved

Sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California, are set forth in Appendix B hereto.

Statement

Appellants are owners and operators of serve-yourself type of gasoline stations in California. The action was brought as a representative suit for declaratory relief to have it adjudicated and declared that §§ 20880, 20881, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California were invalid and un-

constitutional, and as applied to appellants and particularly to a sign which reads "Serve Yourself and Save" were unconstitutional and further appellants requested by their action that respondent officers whose duty it is to enforce said statutes should be enjoined from enforcing any of said statutes against any of the appellants and particularly as applied to a sign which reads "Serve Yourself and Save."

The appellants sue for the benefit of owners and operators of self-service type of gasoline stations, there being ninety of such stations in the State of California at the time the action was filed. Appellees are charged with the duty of enforcing and executing in the State of California §§ 20880, 20881, 20883, 20884, and 20888 of the Business and Professions Code of the State of California. Appellants maintain on their places of business signs which have been used, maintained and displayed prior to October 1, 1949. Some of said signs in large letters merely state "Serve Yourself and Save," others maintained by appellants read "Serve Yourself and Save 5." Many of said signs maintained by appellants do not refer to the name of gasoline offered for sale, nor state the price of gasoline offered for sale or otherwise conform with the provisions of §§ 20883, 20884 and 20888 of the Business and Professions Code. The signs maintained by appellants have an average value and a cost of approximately $2,000 each. The self-service type of service station operated by appellants and each of the self-service station operators represented in the action represent an average investment in each station of approximately $30,000. The signs that read "Serve Yourself and Save" and signs of similar phraseology are an integral part of the self-service gasoline station type of business. To change the signs or to blank them out would cost appellants at least $100 for each sign. To erect a sign in lieu of the present signs maintained by appellants, which new sign would con-

form to the Business and Professions Code, §§ 20880 to 20888, both inclusive, would cost each appellant approximately $1,500. Respondents threatened to prosecute appellants under the provisions of the Business and Professions Code, §§ 20880 to 20888, both inclusive, upon the grounds that the signs maintained by appellants violated the provisions of said statutes. Respondents caused notices to be served on appellants and each of them that the signs maintained by appellants were in violation of the provisions of the Business and Professions Code above referred to, and notified appellants that appellants would be prosecuted unless said signs were changed. Two of the appellants at the time of the trial had been prosecuted for alleged violation of § 20880, subdivisions (a) and (b) of the Business and Professions Code. Respondents stipulated that pending the decision of the trial court appellants would not be prosecuted.

The trial court held that the statutes were not unconstitutional but were proper exercises of the police power and refused to enjoin the appellees from enforcing the statutes against appellants. The Supreme Court of California by its judgment filed October 31, 1952, affirmed the judgment of the trial court. A petition by appellants for a rehearing in the Supreme Court of California was denied, November 25, 1952.

The Questions Are Substantial

The "Serve Yourself" type retail business in just a few post-war years has become a vital and integral part of American economic life. The gasoline industry has been one of the nurturing fields for this type enterprise, and the customer who is willing to do the work of the service station attendant should be allowed to save the owner's cost of employing an attendant. It is an enterprise the American

motoring public has taken to wholeheartedly, and "Serve Yourself" gasoline stations are flourishing in all parts of the nation. Thus far, there are decisions in five states interpreting legislation designed to regulate the "Serve Yourself" gasoline industry and many of the decisions are conflicting. A ruling by the Supreme Court of the United States construing the statutes involved in this appeal will greatly enlighten the entire industry since the California statutes are the most detailed and intricate of all such statutes.

The situation before us is not unlike *New State Ice Co. v. Liebmann*, 285 U. S. 262. There, as here, a state purported to regulate a private business which was not affected with a public interest and which did not in any way bear upon public health or morals. This court was quick to strike down the legislation involved in the *Liebmann* case which unduly and unnecessarily burdened the lawful business there involved. In the case sought to be reviewed here we have a lawful business not in any way affected with a public interest. This Court has expressly declared that the retail gasoline business is not a business affected with a public interest. *Williams* v. *Standard Oil Co. of Louisiana*, 278 U. S. 235. However, the Supreme Court of California has said that the Legislature of that state may, under the guise of the police power, legislate the lawful business out of effective existence. That court has ignored the mandate of the Supreme Court of the United States pronounced in the *Liebmann* case at page 278:

> "Plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment."

The principal asset of the the Serve Yourself gasoline stations is the sign, "Serve Yourself and Save", which has been generally used to identify the station and proclaim to the public that the service station so identified is one operating on a different basis than other service stations. To take the sign away, or to burden it with riders and appendices that all but obliterate the essential words and in addition make the construction of such a sign financially burdensome, is to take from the industry the *sine qua non* which distinguishes it from the rest of the gasoline industry. Before such a welcome industry is rendered inoperative, appellants urge that the Supreme Court of the United States examine the situation.

The necessity for a pronouncement by the United States Supreme Court in the field of regulation of Self-Service gasoline stations is clearly evidenced by the confusion rampant in the industry due to conflicting state court decisions. A statute similar to the California provisions here under review was held unconstitutional in *Regal Oil Co.* v. *State*, 123 N. J. 456, 10 A 2d 495. To similar effect was the decision of the Supreme Court of Errors of Connecticut in *State* v. *Miller*, 126 Conn. 373, 12 A 2d 192. The decision of the Supreme Court of California here sought to be reviewed is in direct conflict with these decisions. There is also a decision by the Massachusetts Supreme Court upholding a statute regulating Self-Service stations. *Sloane* v. *Godley*, 23 N. E. 2d 133.

Unless this Court takes jurisdiction of the matter here involved a lawful, welcome, infant industry will have been legislated out of existence. It is for the best interests of the nation and the petroleum industry that the highest court of the land make its examination and pronouncement before the death of the Self-Service gasoline station industry is declared. Plaintiffs-Appellants respectfully urge the Su-

preme Court of the United States to take jurisdiction in the above matter.

Respectfully submitted,

EDWARD S. SHATTUCK,
Counsel for Petitioners.

GUTHRIE, DARLING & SHATTUCK,
MILO V. OLSON,
SALISBURY & KNUDSON,
Of Counsel.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

L. A. 21968

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a Corporation, et al., *Plaintiffs and Appellants,*

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Respondents;

ULRICH'S SERVE YOURSELF STATIONS, INCORPORATED, a California Corporation, et al., *Intervenors and Appellants*

Plaintiffs and intervenors, owners and operators of self service gasoline stations, appeal from a judgment declaring that sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code, regulating price advertising on or near gasoline stations, are constitutional and are applicable to plaintiffs' price signs.

Appellants contend that the sections in question involve an improper exercise of the police power, depriving them of their property without due process of law. It is further contended that these sections violate Article IV, Section 25, subdivision 33 of the California Constitution in that they constitute a special law that is unnecessary because a general law (Bus. & Prof. Code § 17500) is and can be made applicable. We have concluded that this regulation of price advertising is a proper exercise of the police power and that the judgment must be affirmed.

The sections in question[1] require price signs, other than price signs on the gasoline dispensing apparatus (Bus. &

[1] § 20880. "(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such prem-

Prof. Code §§ 20820-20826), to set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade. Signs using the words "save," "off," "discount," "less," "below," or words of similar meaning are considered price signs. The signs employed by appellants and others in the business of owning or operating gasoline stations use thereon the words "SAVE," "SERVE YOURSELF AND SAVE," and "SAVE 5," followed by small lettered words "cents," "ways," "minutes," or minor variations of the same. Many of said signs do not refer to the name nor state the price of the gasoline offered for sale.

In reviewing legislation for the purpose of testing its propriety as an exercise of the police power, "[t]he power of the court is limited to determining whether the subject of the legislation is within the state's power, and if so to

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ises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, 'save' a designated amount, or a designated amount per gallon, such as 'save 5 cents' or 'save 5 cents per gallon,' or using the expression 'off' a designated amount, such as '5 cents off' or '5 cents less,' or 'discount' of a given amount, such as '5 cents discount,' or otherwise using the words 'save,' 'off,' 'discount,' 'less,' 'below,' or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter."

§ 20882. "All letters, figures or numerals used in designating the brand name or words 'no brand' in any advertising medium referred to in this

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determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained." (Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 456.) Furthermore, it must be presumed at the outset that the Legislature acted within its powers. (Hart v. City of Beverly Hills, 11 Cal. 2d 343, 348.) The burden is upon those attacking the statute to make a showing that the statute is unconstitutional.

With this brief statement of the governing principles, we turn to the legislation at hand. It is apparent upon its face that the primary purpose of this legislation is the prevention of misleading advertising, which purpose has long been deemed a proper subject for the exercise of the police power. (Note, Ann. Cas. 1916 A, 960; 89 A. L. R. 1004; 2 Cal. Jur. 2d 606; and 11 Am. Jur., Constitutional Law, §283, p. 1043. See also Hart v. City of Beverly Hills, supra, 11 Cal. 2d 343, 350; In re Sidebotham, 12 Cal. 2d 434, 436; and In re McNeal, 32 Cal. App. 2d 391, 394.)

The next step is the consideration of the means employed

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article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral."

§ 20883. "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.'"

§ 20884. "The advertising medium referred to in this article shall not contain any other advertising matter whatsoever, except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words 'no brand.'"

§ 20885. "For the purpose of this article, fractions are considered one numeral."

§ 20886. "The numeral one or the letter 'l' need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used."

by the Legislature to reach this legitimate end. These involve primarily the requirement of full disclosure, a method approved in In re Sidebotham, supra, 12 Cal. 2d 434, 436. To demonstrate the unconstitutionality of these statutes, appellants cite and rely upon a series of cases declaring statutes unconstitutional which prohibit *all* price advertising on or near gasoline stations except those signs of a limited size permitted on the pumps. (Regal Oil v. State, 123 N. J. L. 456, 10 A. 2d 495; State v. Miller, 126 Conn. 373, 12 A. 2d 192; and Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80. But cf., Merit Oil Co. v. Director, 319 Mass. 301, 65 N. E. 2d 529; People v. Arlen Service Stations, 284 N. Y. 340, 31 N. E. 2d 184; and State v. Hobson [Del.] 83 A. 2d 846.) However, the legislation under consideration here differs substantially from that involved in the above cases. There the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited. Our statutes do not prohibit effective advertising in this sense. Rather, sections 20882 and 20883 of the Business and Professions Code encourage the same by establishing minimum requirements as to size of lettering on the signs, thereby making more certain that the passing motorist can read them. The difference is of significance. The ultimate right to advertise price is unaffected by our statutes. Although the Legislature may be denied the power to destroy a given right, the authority to regulate its exercise is recognized. (See Hart v. City of Beverly Hills, supra, 11 Cal. 2d 343, 350, and cases cited therein.)

The decision of the United States Supreme Court in Williams v. Standard Oil Co., 278 U. S. 235, is not a barrier to this legislation. There it was held that a state could not fix the price of gasoline for the reason that the business of selling gasoline is not one "affected with a public interest." But regardless of the standard by which the validity of price-fixing legislation should be tested (Tyson & Brother v. Banton, 273 U. S. 418, 430; See Nebbia v. New York, 291 U. S. 502; and Olsen v. Nebraska, 313 U. S. 236), the statutes in question do not deal with price-fixing and the Williams case is not controlling here.

Although the right to advertise is a property right

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(People v. St. John, 108 Cal. App. [Supp.], 779), the requirement of full disclosure of price and brand name is a reasonable method of regulating gasoline advertising, and the statutes have a real and substantial relation to legitimate objectives of the police power. The law does not become oppressive or confiscatory by reason of the fact that it may be more costly to conform to its requirements.

Nor is there any merit in the contention that this legislation represents an arbitrary attempt to eliminate competition in the retail selling of gasoline. It is not our function to search for motive in testing the constitutionality of a statute. (Daniel v. Family Ins. Co., 336 U. S. 220, 224.)

There can be no doubt that many gasoline price signs are misleading. When a motorist on the highway sees a sign which states in large letters "Save 5" or "5 Off," he can reasonably assume that he will save 5 cents per gallon below the price of gasoline sold in conventional service stations. And when these words are followed by the words "minutes," "ways," or the like, in small letters, the signs are highly misleading. Appellants do not argue at great length that the regulation of such signs is a violation of due process. Rather, they argue that the statute would be unconstitutionally applied if enforced against the sign "Serve Yourself and Save." (Brock v. Superior Court, 12 Cal. 2d 605, 610.) Respondents have indicated an intent to so enforce the statute. While it is generally true that the motorist can realize a saving in the self service type station, and that this sign is therefore literally true, we cannot agree that the application of the requirement of full disclosure of price and brand name will violate due process of law. The convenience to the motoring public in having the price per gallon plainly disclosed where there is a representation that a saving can be made may well have been a real consideration of the Legislature in enacting the statutes. The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation, we can not declare this legislation invalid.

The final contention that this statute violates Article IV, Section 25, subdivision 33 of the California Constitution is likewise without merit. This section states: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: In all other cases where a general law can be made applicable."

The question whether a general law can be made applicable is one of the Legislature, "to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere, unless the disregard of the constitutional requirement is clear and palpable." (People v. Mullender, 132 Cal. 217, 221; Accord: Wheeler v. Herbert, 152 Cal. 224, 232; Matter of Petition of Burke, 160 Cal. 300, 302-303; and Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 276-277.) There is no disregard of the constitutional requirement here. To the contrary, it is apparent that section 17500 of the Business and Professions Code, which prohibits false or misleading advertising in general, could not be applied to require a full disclosure of price or brand name of gasoline offered for sale.

The distinction between a general and a special law within the meaning of the Constitution has been stated as follows: "[A law] . . . is general . . . when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. . . . [It is a special law] . . . if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." (City of Pasadena v. Stimson, 91 Cal. 238, 251-252.) It is therefore clear that the constitutional prohibition against special legislation does not preclude legislative classification, but only requires that the classification be reasonable. (See People v. Western Fruit Growers, 22 Cal. 2d 494, 506, and cases cited therein.) Here, the legislation applies equally to all persons engaged in the business of selling gasoline. The classification is a reasonable one. Gasoline is a unique commodity in that few people, if any,

can distinguish between grades or brands by the use of the senses. Unlike many other commodities, its sale is final in the sense that there is no practical way for the motorist to return or exchange the purchased commodity, if dissatisfied. Price and brand name are the principal factors in its sale, and therefore, advertising of these elements in a misleading manner is peculiarly subject to abuse. Furthermore, it must be presumed that the Legislature has made a careful investigation in the field, and that it has properly determined that the interest of the public requires this regulation. (Pacific Coast Dairy v. Police Court, 214 Cal. 668, 674.) No showing to the contrary has been made.

The judgment is affirmed.

SPENCE, J.

We concur:

GIBSON, C. J.
SHENK, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.
McCOMB, J., *pro tem.*

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

Division One

Civil No. 18559

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a corporation, et al., Plaintiffs and Cross-defendants and Appellants,

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Defendants, Cross-complainants and Respondents.

UBICH'S SERVE YOURSELF STATIONS, INCORPORATED, a California corporation, et al., Intervenors and Appellants.

Appeal from a judgment of the Superior Court of Los Angeles County, Julius V. Patresso, Judge.

For Appellants: Guthrie, Darling & Shattuck, Milo V. Olson; Salisbury & Knudson.

For Respondents: Edmund G. Brown, Attorney General; John F. Hassler, Deputy Attorney General.

This is a representative suit for declaratory relief instituted by several operators of serve-yourself type of gasoline stations who sought an adjudication that a statute, purporting to prohibit certain types of advertising signs on or near filling stations, is not applicable to the signs erected by them; and, if the statute is applicable that it is unconstitutional.

The various signs involved in this case differ somewhat in that some state thereon merely the word "Save"; others, "Serve Yourself and Save"; and still others, "Save 5" in large letters followed in small letters by either the word "cents," or "ways" or "minutes," or minor variations of the same general tenor.

The statute here involved,[2] enacted in 1949, is but a continuation or enlargement of a series of statutes initially enacted since 1931 seeking on the one hand to require, and on the other hand, to restrict the manner and method of posting prices of gasoline and oils at filling stations.

The initial statute enacted in 1931 required filling stations to post on all gasoline pumps the brand, trade-mark or trade name (or if none then "no brand") and the price per gallon of all gasoline dispensed therefrom. The validity or applicability of this statute as it has since been amended is not involved in the instant case. The statute before us, first partially enacted in 1941, and later amended after the advent of the so-called "serve yourself" filling stations, restricts the use of all price signs at or near the stations to the statutory required price sign on each pump, unless such added price sign or signs set forth in detail

[2] Bus. & Prof. Code, sec. 20880: "(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

and in lettering as large as any other lettering thereon, the total price per gallon including taxes of any brand or grade (naming it) of gasoline offered for sale on the premises. A price sign by the express words of the statute includes any sign whereon appears the word "Save."

As each and every one of the signs involved in this appeal contains the word "Save," it follows that all the signs are within the purview of the statute and that they all violate the statute because they fail to set forth the details required by the statute, i.e, the total price including taxes along with the trade name or brand of the gasoline advertised for sale. The fact that all the operators, here involved, regardless of the language used on their signs sold gasoline at a price less than that of the conventional stations is under the language of the statute immaterial and hence a false quantity.

That being the case we come to the sole remaining question, which is whether the statute is unconstitutional insofar as it requires the statutory details above mentioned to be set forth upon the signs here involved. On that point we are of the opinion that the statute is clearly unconstitutional.

In so ruling we wish to say at the outset that we perceive that the purpose of the legislature in enacting the statute may not only be regarded as salutary but that it is a well-intentioned endeavor to eradicate a present-day evil, i.e., misleading advertisements. When a motorist driving along a street or highway is faced with a sign stating in large letters "Save 5," readable by him at a distance, we think he may well expect upon turning into the station to save 5 cents on the price of either regular or ethyl gasoline below that of the price of the conventional service stations. If in turning into the station and stopping at a pump he learns upon a closer inspection of the sign or from the price posted on the pump that he will not save anything in the way of price or at least less than 5¢ per gallon he unquestionably has been misled by the sign and quite naturally may be irked. Conceivably he may be misled once, but we think it quite possible, if not probable, that he will not again thereafter stop at a filling station displaying in large letters the word "Save" unless his gasoline tank is too near empty to pro-

ceed further. If that be his attitude, as we believe it may well be, then the operators of filling stations who use the words "Save 5" on their signs and actually sell their gasoline at 5c less than the conventional price will thereafter be harmed to a greater or less extent. The laws of compensation, as enunciated by Emerson, still hold full sway. But, be that as it may, the constitutionality of a statute may not be measured by the fact it is salutary from the standpoint of a consumer or the general public in that it tends or may tend to eradicate an evil such as misleading advertisements.

In coming to grips with the question before us we must assay the statute in the crucible of constitutional law. In that appraisement we are faced with the long-established principle that a state legislature may not regulate or control private business unless it is affected with a public interest, which is not the case here (Williams v. Standard Oil Co., 73 L. Ed. 287, 278 U. S. 235), or unless it is necessary for the public safety, public health or public morals, or any phase of the public welfare—all of which come under the head of the police power and no other constitutional power. The public safety may require that a filling station be controlled or regulated so as to eliminate the danger from fires or explosions of gasoline; the public health may possibly require that gasoline fumes be controlled; the public morals that gasoline filling stations should operate as such and not as fronts for businesses inimical to public morality. But just how signs of the character here involved can possibly endanger or affect the public safety, the public health, the public morals or the public welfare we fail to see, and in that aspect the brief of the attorney general is not convincing. To be sure the price which the great host of consumers—the general public—must pay for an article affects more or less the financial welfare of this great segment of the public, but even so it has never yet been held that a legislature may regulate prices under the public welfare concept. In that aspect Williams v. Standard Oil Co., 278 U. S. 235, is the leading and controlling authority to the contrary.

If it is important to the public welfare to steer the public

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away from filling stations that advertise upon large signs, in large letters, the word "Save"—without stating in detail the saving. Then it is equally true that the public welfare requires that all other businesses who do the very same thing should be pilloried by like statutes. There is nothing about the filling station business in its endeavor to sell a gallon of gas that differentiates it from the grocer who endeavors to sell a can of peas. The public is not harmed if it chooses to buy a gallon of gas, without service, at a price less than a gallon with service, but the welfare of a conventional dealer who gives the service may well be affected. That, however, does not affect the public welfare, but only the welfare of competitors in the business of supplying gasoline.

The operator of a serve-yourself filling station is engaged in selling gasoline without service and in order to compete with the conventional type of station he must sell for less. His product appeals to the passing motorist only if such motorist prefers to wait on himself in return for a saving on the regular price of the product. The appeal is akin to that made to a housewife by the serve-yourself grocery. To compete, the grocery and the filling station must advertise the fact that a patron will save. The word "Save" blazoned on a sign upon the grocery store cannot be differentiated in its appeal, in its drawing power, or in its opportunity for fraud from that of a like sign at a filling station. A sign bearing only the word "Save" or "Serve-Yourself and Save" is not *per se* misleading or fraudulent. It is only when the commodity is sold at a price at which there is no saving that the sign may be said to attain the status of being misleading or fraudulent. The passing motorist is no more entitled to have the saving spelled out for him than is the passing consumer entitled to have the grocery do likewise. The fact that the statute applies to dealers of petroleum products only and not to dealers of other commodities is not by this mere difference a sufficient classification to save the statute from a charge it is discriminatory and violates the equal protection clauses where the end operation or result is the same. (Cf. Liggett Co. v. Lee, 288 U. S. 517.)

A motorist may be inconvenienced when he drives into a

filling station which does not advertise that it is a self-service station or which does not advertise by large signs the price of the product sold. Likewise he is inconvenienced if the price is higher than he expected to pay regardless of whether there is or is not a large sign bearing the word "Save." But any such inconvenience suffered by the prospective purchaser is not a fraud upon him or of such moment as to warrant the exercise of the police power to save him from the inconvenience.

The statute not only interferes arbitrarily with private business, but in addition it imposes unreasonable and unnecessary restrictions upon such business. (New State Ice Co. v. Liebmann, 285 U. S. 262.) Moreover, the statute violates our state constitution (Art. IV, sec. 25[33]) in that it is a special law that is unnecessary because a general law is and can be made applicable. Such a law is Business and Professions Code, sec. 17500, which makes it unlawful for dealers, such as we have here, to advertise a fact which is untrue or misleading.

The statute before us differs from the statutes of several other states which have sought to restrict filling stations from advertising their product in that those statutes endeavored to bar all advertising of prices save upon the very small signs permitted on the pumps, whereas our statute permits such additional price signs but only if they spell out the saving. However, the principle applied in holding such statutes unconstitutional is equally applicable here. The cases all proceed on the theory that such additional signs have no detrimental effect upon, and bear no reasonable relation whatsoever to, public safety, health, morals or welfare. (State v. Miller [1940] 126 Conn. 373, 12 Atl. 2d 192; Regal Oil Co. v. State [1939] 123 N. J. L. 456, 10 Atl. 2d 495; Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80; Cf. People v. Mestichelli [1939] 18 N. Y. S. 2d 406; Alabama Independent Serv. Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502; State v. Hobson (Del.) [1951], 83 Atl. 2d 846. Views contrary to those reached by the Connecticut, New Jersey and Michigan courts are those of Massachusetts and New York. (Slome v. Godley, 304 Mass. 187, 23 N. E. 2d 133; Merit Oil Co. v. Director of

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Division of Neces. of Life, 319 Mass. 301, 65 N. E. 2d 529, and People v. Arlen Service Stations, 284 N. Y. 340, 31 N. E. 2d 184.)

As in our view the act is unconstitutional as applied to the signs here involved the judgment appealed from should be and it is reversed.

HANSON,
J. Pro Tem.

We concur:

WHITE, *P. J.*
DRAPEAU, *J.*

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium . . . using the words 'save,' . . . , or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter." (i.e., referring to price signs on pumps.)

Sec. 20881: "If gasoline or other motor vehicle fuel is offered for sale or advertised for sale from the premises of any place of business in this State, but not under any trade name or brand name, then the words 'no brand' shall be used and designated on the advertising medium."

Sec. 20883: "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uni-

form in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.' "

APPENDIX "B"

Business & Professions Code

§ 20880. (a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words "gasoline" or "motor fuel" and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, "save" a designated amount, or a designated amount per gallon, such as "save 5 cents" or "save 5 cents per gallon," or using the expression "off" a designated amount, such as "5 cents off" or "5 cents less," or "discount" of a given amount, such as "5 cents discount," or otherwise using the words "save," "off," "discount," "less," "below," or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter.

§ 20882. All letters, figures or numerals used in designating the brand name or words "no brand' in any advertising medium referred to in this article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral.

§ 20883. All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words "no brand."

§ 20884. The advertising medium referred to in this article shall not contain any other advertising matter whatsoever except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words "no brand."

§ 20885. For the purpose of this article, fractions are considered one numeral.

§ 20886. The numeral one or the letter "1" need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952.

No. 676.

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., *et al.*,

Appellants,

vs.

A. A. BROCK, *et al.*,

Appellees.

URICH'S SERVE YOURSELF STATIONS, INC., *et al.*,

Intervenor.

Appellants' Reply to Appellees' Motion to Dismiss or Affirm and Statement Making Against Jurisdiction.

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URICH'S SERVE YOURSELF STATIONS, INC., *et al.*,

Intervenor.

Appellants' Reply to Appellees' Motion to Dismiss or Affirm and Statement Making Against Jurisdiction.

I.

The Assignment of Errors in Appellants' Jurisdictional Statement Is Sufficient.

The sole function of the assignment of errors is to apprise the court and opposing counsel of those contentions which must be met by opposing counsel and passed upon by the court. The assignment of errors in this case must be read in the light of the unusual circumstances under which the case came to issue and was presented in

the lower courts. As indicated by appellees' opposing statement at page 2 there were originally three Causes of Action alleged in appellants' complaint to the trial court. When appellants failed to amend their pleading after appellees' demurrer to the first two causes of action was sustained the matter went to trial on the allegations of the Third Cause of Action. The Third Cause of Action incorporated all of the allegations of the First Two Causes of Action. It was a cause of action for declaratory relief in which appellants asked the court to declare that the statutes in issue were unconstitutional and unconstitutionally applied to appellants' sign "Serve Yourself and Save." It must be remembered that the case went to trial on a set of stipulated facts. There was no trial in the ordinary sense, hence there are no specific errors such as usually occur in the trial of a lawsuit which can be assigned as error. In *Seaboard Air Line Ry. Co. v. Watson*, 287 U. S. 86, which appellees have cited as authority that the assignment of errors by appellant is not sufficient, the basis of the court's objection to the assignment was that even after a lengthy trial there were no specific errors alleged.

Both at the trial stage and through the presentation of the matter on appeal before the District Court of Appeal and the Supreme Court of California the proceedings involved the determination of the validity of the statute as measured against appellants' sign "Serve Yourself and Save." The sole question was whether the statutes in issue were unconstitutional in that they de-

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prived appellants of the right to maintain this sign, a valuable property right, unfettered by burdensome additions. That same question is presented by this appeal and is expressly set forth in the assignment of errors at paragraph 2. This assignment alone clearly sets forth the one issue before this court, and when coupled with the statement of the "questions presented" in appellants' jurisdictional statement, it clearly and adequately specifies the exact question appellants seek reviewed here, and what contention appellees must meet.

II.

The Constitutional Question Was Raised in the Initial Stages of the Case.

Appellees' statement opposing jurisdiction asserts that appellants' contentions that the statutes were unconstitutional and were unconstitutionally applied was first raised on appeal for the reason that the case went to trial on the Third Cause of Action. However, it is to be noted that the Amended Complaint in its Third Cause of Action specifically incorporated all allegations and contentions of the First and Second Causes of Action and the case went to trial on all of the allegations of the original complaint. These contentions included both the argument that the statute was unconstitutional and was unconstitutionally applied to the appellants so as to deprive them of their property without due process of law. These allegations more than adequately show that the appellants' contentions that the statutes were violations of the United States Constitution were raised at the in-

cipient stages of the case and were not mere after-thoughts on appeal.

Wherefore, appellants respectfully urge that their "Statement as to Jurisdiction" shows sufficient grounds for jurisdiction of this court and that the appellees' Motion to Dismiss should be denied, or in the alternative that the appellees' Motion to Affirm be denied.

Respectfully submitted,

EDWARD S. SHATTUCK,

Counsel for Appellants.

GUTHRIE, DARLING & SHATTUCK, and
SALISBURY & KNUDSON,

Of Counsel.

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FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 676

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INCORPORATED, ET AL.,
Appellants,

vs.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Assistant Attorney General,
Counsel for Appellees.

JOHN F. HASSLER,
Deputy Attorney General,
Of Counsel.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. L. A. 21968

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., A CORPORATION, ET AL.,

Appellants,

VS.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.,

URICH'S SERVE YOURSELF STATIONS, INCORPORATED, A CALIFORNIA CORPORATION, ET AL.

APPELLEES' OPPOSING STATEMENT

Come now defendants, respondents and cross-complainants, appellees herein, and file this their Statement Disclosing Matters and Grounds Making Against the Jurisdiction of this Court, as asserted by appellants.

Appellants' *Statement as to Jurisdiction* declares, at page 2, lines 8-14, that:

> "This case at its inception was an action to enjoin the enforcement of the hereinafter cited provisions of the Business and Professions Code of the State of California on the grounds that they were violative of the United States Constitution. The trial court held the statutes valid and refused to enjoin the enforcement of them against plaintiffs, appellants herein."

In their Amended Complaint for Injunction and Declaratory Relief, plaintiffs attempted to allege three causes of action,—the first two for injunction, the third for declaratory relief. Paragraph XIII of the first cause of action alleged that:

> "The sections of Business and Professions Code set forth in Exhibit 'A' are unconstitutional and void in that they take the property of plaintiffs without due process of law in violation of the provisions of the United States Constitution and the Constitution of the State of California. Said statutes are an unconstitutional restriction upon the legitimate business activities of plaintiffs, and further, said statutes, if enforced, are an arbitrary, unnecessary and discriminatory exercise of the police power of the State of California. Said statutes are violative of the provisions of the United States Constitution, Amendment XIV, Section 1, and the California Constitution, Article I, Sections 1, 3 and 13, and Article IV, Section 25, Subdivision 33."

The second cause of action re-alleged all paragraphs of the first cause of action and added one further paragraph (XVI), as follows:

> "Said sections of the Business and Professions Code if applied to the signs of plaintiffs or a sign reading 'Serve Yourself and Save' or 'Serve Yourself and Save 5c' or signs of similar wording, results in unconstitutional applications of said statutes to plaintiffs and to each of them."

The trial court, in the Law and Motion Department, filed a Memorandum Ruling reciting in part as follows:

> "In *Brock* v. *Superior Court*, 12 Cal. 2d 605, the factual allegations of the complaint supported the conclusions that the law either was unconstitutional or was being unconstitutionally applied. The court does not feel that the allegations of the first and second causes of action support the conclusions of law which

> are pleaded in paragraph XIII of the first cause of action (see *Callahan* v. *Broderick*, 124 Cal. 80)."

The court then sustained demurrers to the first and second causes of action and allowed ten days within which to amend the complaint. Plaintiffs thereupon gave Notice of Ruling wherein, among other things, they advised:

> "You are further notified that plaintiffs do not intend to file an amended complaint and therefore defendants have ten days within which to answer the third cause of action of the amended complaint on file herein."

Defendants joined issue on the third cause of action and filed cross-complaint. The Memorandum Ruling and Notice of Ruling were not a part of the record on appeal. Copies of the documents, certified by the clerk of the trial court, are appended hereto as Exhibits "A" and "B".

It is thus apparent that the constitutional point was initially raised in connection with an application to enjoin, as asserted by appellants. However, the point was promptly abandoned by the election not to amend to state facts supporting the recited conclusions of law. The Amended Complaint recited no facts showing or tending to show that the statutes are unconstitutionally applied as to plaintiffs. By their terms, the code provisions are applicable to all persons engaged in the business of selling gasoline, whether "serve-yourself" type operators or others. While it is true that the trial court refused to enjoin enforcement of the statute, it is also true that plaintiffs were granted leave to amend their complaint to state facts supporting the conclusions of law. Instead, plaintiffs elected to go to trial on the cause seeking a declaration of rights and duties upon the bare allegation of a constitutional question. The claim of deprivation of right under the due process clause was first raised in briefs and arguments, which are not a part

of the record (*Zadig* v. *Baldwin*, 166 U. S. 485). However, the Supreme Court of California has passed upon the question and the deficiency is cured (*Charleston, etc.* v. *Alderson*, 324 U. S. 182). Appellants' *Assignment of Errors* recites (page 2) that the California Supreme Court erred in holding that the sections are not being unconstitutionally applied to appellants. There are no allegations of facts and there is no evidence in any way supporting the instant assertion that the Code provisions are unconstitutionally applied.

At page 3 of the *Statement as to Jurisdiction*, appellants declare that the question is whether the State can competently forbid the display of a sign which reads "'Serve Yourself and Save', which sign tells the truth". The Amended Complaint alleges that plaintiffs also display signs advertising "Serve Yourself and Save 5¢"; the parties stipulated that such signs, maintained by some of the plaintiffs, were not changed when the price of gasoline no longer reflected a saving as great as five cents. The assertion of appellants, that their signs "tell the truth", is contrary to their pleadings and to the evidence. The California statutes are directed against false and misleading advertising. They merely regulate the display of advertising on *price* signs and define such signs as including those which employ the words "save", "off", "discount", "less", or words of similar import. *Price* signs must show the total price per gallon, including taxes, the brand name, and may contain words of description of the product. On *price* signs, no other advertising may be displayed. Any other advertising of any other character, including the words "Serve Yourself", may be displayed on any other sign, anywhere upon the premises.

It is stated at page 4 of the *Statement as to Jurisdiction* that appellants maintained and displayed their signs prior

to October 1, 1949. That was the date the most recent amendment to the law became effective and the statement permits an inference that the law was in this respect enacted after the appearance of such advertisements. In fact, the basic provisions of the law have existed in California since 1931; in 1949 the law was amended to *permit* display of the words "save", "off", "discount", and "less", under certain conditions.

At page 6 of said *Statement*, it is asserted that the question raised by appellants is substantial and that "there are decisions in five states interpreting legislation designed to regulate the 'Serve Yourself' gasoline industry and many of the decisions are conflicting". It is asserted that a ruling by this Court will enlighten the industry because the California statutes are more detailed. In our view, appellants have not met the requirement of Rule 12 in that the statement of grounds does not support appellants' contention that the question is substantial. We are aware of no cases, and appellants have cited none at any stage of the proceedings over the course of the years, which interpret legislation designed to regulate the "Serve Yourself" gasoline industry. The plaintiff Urich filed an affidavit on behalf of all plaintiffs in support of an application for temporary restraining order and preliminary injunction. He there recited that Serve Yourself Gasoline Stations Association, Inc., was the originator of the "Serve Yourself" type of merchandising in the United States and that the first such station commenced operation in May, 1947. All but two of the cases cited and considered arose prior to 1947; *Levy* v. *City of Pontiac* (Mich., 1951), 49 N. W. 2d 80, and *State* v. *Hobson* (Dela., 1951), 83 A. 2d 846 arose later. However, as in the earlier cases, there is no intimation in either case that the affected business was a "Serve Yourself" type operation and the statutes were not in terms

directed at such operations. Said affidavit was not a part of the record on appeal. Copy of the document, certified by the clerk of the trial court, is appended hereto as Exhibit "C".

It is true that there is a conflict among decisions of other states with respect to the somewhat uniform statutory requirements of those states. But it is absolutely not true that there is a conflict between the decisions of any such states and the decision of the California Supreme Court from which an appeal is here sought. The California law is wholly unlike the laws of other states. Our law does not forbid the display of price signs nor does it establish a maximum size of signs or of lettering used upon such signs. All of the cases cited and relied upon by appellants at all stages below concern laws which limit the size of lettering upon price signs or the placement of price signs upon the premises. We maintain and our Supreme Court has determined that the California law differs substantially. As our court has correctly declared, in *other* states the "right to maintain signs of a sufficient size to be read by the passing motorist was prohibited".

A cursory examination of the cases cited by appellants at page 7 of their *Statement as to Jurisdiction* will disclose that appellants err when they state that *Regal Oil Co.* v. *State*, 10 A. 2d 495, reviewed a statute similar to the California law, and that the case of *State* v. *Miller*, 12 A. 2d 192, was to similar effect. Such an examination will demonstrate that appellants are also in error when they assert that the decision here sought to be reviewed is "in direct conflict with these decisions". Moreover, and contrary to the statement of appellants, *Slome* v. *Godley*, 23 N. E. 2d 133 does not uphold a statute regulating "Self-Service stations",—although it does uphold a law regulating display of price advertising at gasoline stations.

Throughout their said *Statement*, appellants urge that the California law is an attempt to legislate out of existence a welcome and necessary industry. This is not true. The California law existed for many years prior to the instant method of merchandising and is merely concerned with truthful advertising. Its regulations extend to all operators who elect to display a price sign, whether the merchandising is done by "serve-yourself" or conventional methods. Such operators may or may not advertise price. If they do, they must set forth the price fully and they may not display other advertising upon the price sign although they may display words of description of the product offered for sale.

The cross-complaint appended 18 examples of advertising which the parties stipulated are replicas of existing signs in this State. Some of such signs proclaim "Serve Yourself and Save" in large letters and display, in obscure print, the words "time", "minutes", and other such unrelated references. Additionally, the words "Save 5" and other such expressions can be registered as brand names in this State. The Petition for Hearing in the California Supreme Court includes, as Appendix "A" two exemplars of Claims for Registration of Trade-Marks, as certified by the Secretary of State, State of California. The claims concern the trade-marks, "5 Off" and "Save 5". It is obvious that a sign reading "Serve Yourself Save 5" can be highly misleading. The exemplars of claims appear in said Petition, following page 15; the Petition has been designated as a part of the record on appeal by appellees' Counter-Praecipe. The Court will take judicial notice of the many reasons that sustain a legislative enactment of this sort and will observe that signs may be so arranged and worded as to deceive and confuse the motorist. In consequence, the Court will conclude that desirability of a

statute is not a matter for judicial inquiry but resides in the discretion of the Legislature (*Daniel* v. *Family Life Ins. Co.*, 336 U. S. 220; see, also, Note in *93 L. Ed. 637*).

WHEREFORE, appellees respectfully submit that the within Statement asserts sufficient grounds making against the jurisdiction of this Court and that the accompanying Motion to Dismiss, or, in the alternative, the Motion to Affirm, should be granted.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,
FRANK J. MACKIN,
Asst. Attorney General,
Counsel for Appellees.

JOHN F. HASSLER,
Deputy Attorney General,
Of Counsel.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a corporation, et al., Plaintiffs, Appellants and Cross-Defendants,

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Defendants, Respondents and Cross-Complainants,

UEICH'S SERVE YOURSELF STATIONS, INCORPORATED, a California corporation, et al., Intervenors, Appellants and Cross-Defendants

MOTION TO DISMISS AND ALTERNATIVELY, IF SAID MOTION BE DENIED, MOTION TO AFFIRM

Come now defendants, respondents and cross-complainants, appellees herein, and move the Court to dismiss the within appeal upon the following ground:

1) The Assignment of Errors is too general and presents no question for consideration.

Rule 9, Supreme Court Rules, stipulates that an Assignment of Errors "shall set out separately and particularly each error asserted." Appellants assign two purported errors, as follows:

"1. In holding that Sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California are valid and unconstitutional.

2. In holding that the named sections are not being unconstitutionally applied so as to deprive appellants

> of their property without due process of law, when applied to a sign reading: 'Serve Yourself and Save.' "

Patently, the purported Assignment of Errors does not comply with the object of the Rule in that it does not specify the points upon which appellants rely and thus enable appellees to appraise such points and limit the discussion to them. (*Phillips & Colby Construction* v. *Seymour*, 91 U. S. 648.) The first assignment does not challenge the decision of the California Supreme Court with any particularity. It cannot be ascertained wherein and for what reasons appellants consider said decision erroneous. The second assignment concerns the alleged unconstitutional application of the California law and does not point out the manner in which the law is so applied as to appellants or the activities of appellants which are deemed to be singled out and to be the subjects of discrimination. An Assignment of Errors which is so general that it presents no question for consideration may be disregarded by this Court (*Seaboard Airline Ry. Co.* v. *Watson*, 287 U. S. 86).

Wherefore, appellees respectfully move the Court to dismiss the appeal herein.

In the event said Motion be denied, appellees further move the Court to affirm the decision of the Supreme Court of the State of California upon the following ground:

> 1) The question is so wanting in substance as to require no argument.

It is universally held that a state has the right under its police power to legislate for the prevention of false and misleading advertising (See: Ann. Cas. 1916A, 900; 89 A.L.R. 1004; 11 Am. Jur. 1043; 2 Cal. Jur. 2d 606).

Wherefore, appellees respectfully move the Court to affirm the decision of the Supreme Court of the State of California.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,
FRANK J. MACKIN,
Asst. Attorney General,
Counsel for appellees herein.

JOHN F. HASSLER,
Deputy Attorney General,
Of Counsel.

EXHIBIT "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 565,702

SERVE YOURSELF GASOLINE STATIONS ASSOCIATIONS, INC., a corporation, et al., Plaintiffs,

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Defendants

MEMORANDUM RULING

In *Brock* v. *Superior Court*, 12 Cal. 2d. 605, the factual allegations in the complaint supported the conclusions that the law either was unconstitutional or was being unconstitutionally applied.

The court does not feel that the allegations in the first and second causes of action support the conclusions of law which are pleaded in paragraph XIII of the first cause of action. (See *Callahan* v. *Broderick*, 124 Cal. 80.)

The third cause of action is for declaratory relief, and such a cause of action may be maintained against the state (*Lord* v. *Garland*, 27 Cal. 2d 840), and the facts pleaded sufficiently show the nature of the controversy and the rights which plaintiffs seek to have declared. A plaintiff is entitled to maintain an action for declaratory relief even though the facts pleaded do not show that he is entitled to the relief which he seeks. *Maguire* v. *Hibernia Savings & Loan*, 23 Cal. 2d 719.)

Demurrer re capacity of Service Yourself Gasoline Stations Associations, Inc., to sue sustained without leave to amend.

Demurrer to first and second causes of action sustained.
Demurrer to third cause of action overruled.
Ten days to amend first and second causes.
Motion to strike off calendar.

January 31, 1950.

Arnold Praeger, Judge.

EXHIBIT "B"

In the Superior Court of the State of California in and for the County of Los Angeles

No. 565,702

Serve Yourself Gasoline Stations Association, Inc., a Corporation; et al., Plaintiffs,

vs.

A. A. Brock, as Director of the Department of Agriculture of the State of California, et al., Defendants

Notice of Ruling

To the Defendants and to Fred N. Howser and John F. Hassler, Their Attorneys:

You and each of you will please take notice that by an order duly given and made the above court on the 31st day of January, 1950, overruled the demurrer of the defendants to the third cause of action of plaintiff's amended complaint on file herein. You are further notified that plaintiffs do not intend to file an amended complaint and therefore defendants have ten days within which to answer the third cause of action of the amended complaint on file herein.

Dated: February 6, 1950.

Guthrie, Darling & Shattuck,
By Milo V. Olson,
Attorneys for Plaintiffs.

Salisbury & Knudson,
By Gerald Knudson,
Attorneys for Plaintiff,
A. F. Gilmore Company.

EXHIBIT "C"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 565,702

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a corporation et al., Plaintiffs,

vs.

A. A. BROCK, et al., Defendants

AFFIDAVITS AND SUPPLEMENTAL AFFIDAVITS IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF CALIFORNIA,
County of Los Angeles, ss:

GEORGE R. URICH, being first duly sworn, deposes and says: That he is President of Urichs Serve Yourself Stations, Inc. Said corporation is a California corporation authorized to do business and doing business in the County of Los Angeles, State of California. That said corporation is a member of the association of serve-yourself gasoline stations represented by plaintiff Serve Yourself Gasoline Stations Association, Inc. That said corporation has a common interest in the subject matter of the Superior Court action No. 565702, and with the plaintiffs in said action. Affiant makes this affidavit on behalf of said corporation. Said corporation originated the self-service type of gasoline station in the United States, and particularly in the State of California. Said corporation maintains and operates thirteen of such stations in California. The first station of that type operated by said corporation commenced doing business in May, 1947. On each of said stations there is maintained a large neon sign, 13 feet by 24 feet in size. Attached hereto, marked Exhibit "A" and made a part hereof, is a picture of said sign. Fifteen of such signs are maintained by said corporation. Said signs each cost

approximately $1800. Affiant on this date ascertained the cost of removing from each of said signs the lettering and words "Save 5c a Gal." The cost to remove the tubing and blank out said words is $50 for each side of the sign. All of the signs except one have two sides, so the cost of changing the two-sided signs is $100, and $50 for the one-sided sign. The cost, therefore, to Urich's Serve Yourself Stations, Inc., to change said signs to conform with Sections 20880 and 20884 of the Business and Professions Code would be $1450. In the event it is determined that said sections of said statute are unconstitutional said corporation would be greatly damaged and irreparably damaged in the sum of $1450. Further, the nature of the self-service gasoline station business is that said stations compete with major oil companies who sell nationally advertised brands of gasoline. That patrons and customers can only be successfully attracted to the self-service type of gasoline station by large signs advertising that by serving themselves customers can save money. Otherwise the customers as a result of the national advertising will purchase the nationally advertised brands. By reason thereof such type of sign is absolutely essential to successful operation of a self-service station. Affiant has been engaged in the gasoline service station business for a period of twenty years. Affiant is qualified, in his opinion, to express an opinion as to the trend of business and the effect of advertising and signs of gasoline business. In the opinion of affiant of the sign, copy of which is attached hereto marked Exhibit "A", is removed or covered up, the business at the self-service stations operated by Urich's Serve Yourself Stations, Inc., would fall off approximately 20% to 50%. Those stations operated by Urich's Serve Yourself Stations, Inc., located on major highways where the customer trade is primarily transient would suffer a loss of approximately 50%. Two of the self-service stations operated by said corporation are located on such through highways and would be so affected. In the opinion of affiant the dollars and cents loss on each of said stations per day would be approximately a gross loss of $333 a day and a loss of net profit of $52 a day, and the Urich's Serve Yourself Stations, Inc., would therefore

lose each day approximately $650 net. That said loss is great and is irreparable because in the event said corporation is required to cover said sign or remove said sign pending a hearing on a preliminary injunction or the trial of the foregoing action such loss could not be recovered from any of the defendants. Further, in addition to said actual loss of profits, said service stations would not be operating at a profit, by reason thereof the market value and the value of the investment of each of said self-service type of station would be reduced and jeopardized and said corporation would suffer great and irreparable damage to its investment in each of said stations. In other words, unless that type of station can operate as a self-service station, it is practically valueless; the self-service type of station cannot compete and operate at a profit unless it is able to maintain signs similar to the exemplars set forth as Exhibits "B", "C" and "D" in the foregoing action, or to Exhibit "A" attached to this affidavit, that is, compete with major oil companies who sell nationally advertised brands of gasoline. The gasoline sold at the service stations operated by Urich's Serve Yourself Stations, Inc., is not a nationally advertised brand, although it is a gasoline that is comparable in quality to nationally advertised brands. Further, in order to put up a sign which would attract customers to a self-service type of gasoline station and also meet the requirements of Sections 20880 and 20884 of the Business and Professions Code, it would require the following: First, $100 expense on each of the present signs to remove the words and figures "Save 5c a Gal." and, second, the erection of a new sign of equal size or larger which would have the words "Urich's Serve Yourself Stations, Inc." stating the name of the gasoline and setting forth the price of the gasoline sold. The cost of so doing would be approximately $2500 for each station. Said corporation would be forced and required to do that in order to protect its business and its investment. Such loss would be great and irreparable.

WHEREFORE, affiant prays that a temporary restraining order and preliminary injunction issue enjoining and re-

straining the defendants from enforcing said provisions of the Business and Professions Code pending the trial of this action.

GEORGE R. URICH.

Subscribed and sworn to before me this 5th day of October, 1949.

[SEAL.] A. RUSSELL,
Notary Public in and for said County and State.

My Commission Expires Oct. 17, 1952.

COPY

FILED
APR 29 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 757

FRANK DELAY, HARRY ARNOLD (TRUE NAME HENRY ARMEL),

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

STATEMENT AS TO JURISDICTION

EDWARD S. SHATTUCK,
Counsel for Appellants.

GUTHRIE, DARLING & SHATTUCK,
SALISBURY & KNUDSON,
Of Counsel.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
FRANK DELAY, HARRY ARNOLD (TRUE NAME HENRY ARMEL),
Defendants and Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Superior Court of the State of California entered in this cause.

Opinion Below

There is no formal written opinion by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles in this case. A decision by the said court was expressly postponed pending the decision of the Supreme Court of the State of California in the case of *Serve Yourself Gasoline Stations Association, Inc., et al.*, v. *Brock, et al.*, which decision upholds the statutes under consideration in this appeal and which was rendered on October 31, 1952, and is reported in 39 Cali-

fornia, 829. Said opinion is attached hereto as Appendix A. In affirming the judgment of the trial court in this action the above court expressly incorporated the above cited opinion of the Supreme Court of California. It must be noted that there is no higher court to which further appeal may be made after a judgment of the Appellate Department of the Superior Court has been rendered in cases where that court has jurisdiction.

Jurisdiction

The judgment of the Superior Court, Appellate Department, was entered on December 18, 1952. A petition for appeal is presented to that court herewith, to wit, as of March 16, 1953.

The defendants-appellants herein were convicted of violating Section 20880(b) of the Business and Professions Code of the State of California by the Justice Court of El Monte Township, and sentence was imposed. The above court affirmed the judgment of conviction. The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182; *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94; *Western Turf Association* v. *Greenberg*, 204 U. S. 359.

In satisfaction of Rule 12(1) of the Rules of the United States Supreme Court appellants call to the court's attention the fact that the unconstitutionality of the statutes in issue herein was first raised by demurrer to the complaint charging defendants-appellants with violation of said statutes. The demurrer was overruled and the matter tried. After conviction and on appeal to the above court, defendants-appellants' only two contentions were that the statutes

were unconstitutional and were being unconstitutionally applied to these defendants, in violation of the Fourteenth Amendment to the Federal Constitution. The judgment of the court affirmed the conviction without a written opinion, hence sustaining the validity of the statutes.

Questions Presented

Is a state statute under which a retail gasoline dealer may be convinced and ordered confined for maintaining a truthful sign on his premises which reads "Serve Yourself and Save", an unconstitutional statute which deprives the dealer of a valuable property right and his personal freedom without due process of law?

Statutes Involved

Sections 20880, 20881, 20882, 20883, 20884, 20885, 20886 and 20888 of the Business and Professions Code of the State of California are set forth in Exhibit B hereto.

Statement

Defendants were charged in a complaint dated June 6, 1951, in five counts of violating section 20880(b) of the Business and Professions Code of the State of California. The specific charge was that defendants, while offering for sale and selling gasoline from a place of business displayed a sign reading "Serve Yourself and Save", all in violation of the statute. They were arraigned and allowed to plead on June 19, 1951, at which time their demurrer to the complaint on the ground that the statute cited was unconstitutional, was overruled. Defendants pleaded not guilty, but were found by the court, jury having been waived, to be guilty on all counts. The defendants were ordered confined in the Los Angeles County Jail for the term of 90 days, but the sentence was suspended and the defendants placed on probation for one year.

Defendants thereupon appealed to the Appellate Department of the Superior Court of Los Angeles County, urging a reversal on the ground that the statute under which they were convicted was unconstitutional and deprived them of their liberty and property without due process of law. The appellate court delayed a decision in the matter pending a decision by the State Supreme Court construing the same statute. That decision was rendered in *Serve Yourself Gasoline Station Association* v. *Brock*, 39 Advance California 829, 249 P(2d) 545, declaring the statute constitutional. The above court, Appellate Department, then affirmed the judgment of conviction and by reference expressly incorporated the opinion of the State Supreme Court. An appeal from the judgment of the State Supreme Court was, on January 29, 1953, allowed by the United States Supreme Court and is now pending therein.

The Questions Are Substantial

It is difficult to conjecture a situation more earnestly requiring an examination by the Supreme Court of the United States than the one presented by the case at bar. The statutes sought to be reviewed here are nefarious enough in that they operate as a barrier to free competition in the retail gasoline industry. When it is also shown that the violator, in his pursuit of a livelihood in a competitive market may be jailed for engaging in truthful advertising, the statutes are doubly offensive. These statutes were enacted under the guise of the police power of the State to curb so-called "untruthful and misleading advertising." That the State has such power appellants do not question. However, there is a limit to which that power may go, and when it takes a person's property and deprives him of his liberty without due process that limit has been exceeded. The limit beyond which such legislation must not pass is

this: it may be invoked only when the public health, safety, convenience or welfare is or may be jeopardized. An extension beyond that limit constitutes restrictive and unwarranted regulation of the private rights of persons.

That the application of the statutes to the situation before constitutes an unconstitutional extension of the police power is evidenced by the fact that here, by stipulation, the sign "Serve Yourself and Save" is an admittedly truthful sign. All parties agree that by serving yourself in appellants' station you can save money—the cost of maintaining an attendant. Yet by maintaining this sign in an attempt to advertise a bargain, the appellants were arrested and convicted. It is difficult to see how the public health, morals or welfare is offended by being allowed to know that it may save money by engaging in a little manual labor.

The real answer to the question of why these statutes were enacted is pointed out graphically by the circumstance of their enaction. They were hurriedly enacted by the 1949 Legislature in an attempt to curb the fast growing Serve Yourself industry. As was stated by the court in *State* v. *Miller*, 12 A.(2d) 192, the real purpose was to stifle competition. The "Serve Yourself" type retail business is an infant one, but has caught the fancy of the buying public. The people want this type of operation, yet statutes of this nature would snuff out the life of the industry in its incipient stages. This court has held that the gasoline industry is not affected with a public interest. (*William* v. *Standard Oil Co. of Louisiana*, 278 U.S. 235). In spite of this ruling the Legislature of the State of California has by the statutes in question first attributed a veil of "public interest" to the industry and then has proceeded to legislate a vital segment of that industry out of business. The principal asset of the Serve Yourself Stations is the sign or slogan which identifies and distinguishes them from all other fill-

ing stations. The statutes say that this sign is a "price" sign and must therefore bear the names of all brands of fuel sold and the price per gallon in words as large as the slogan itself. This burdensome requirement demands a sign so large as to be financially prohibitive to build. Since the dealer can no longer proclaim that he is offering a special service, this goodwill and valuable property right is arbitrarily taken from him.

These factors would seemingly be enough to point out the invalidity of the statutes. However, the most deleterious aspect of the situation created by this legislation is that it makes a criminal out of a retailer whose sign does not comply precisely with the statute. It causes a dealer to be arrested and convicted and imprisoned if he dares truthfully proclaim that by trading at his station the individual who pumps his own gasoline may save a few cents. The Supreme Court of the United States is the final bulwark against the abuse created by the statutes here involved.

There are at present conflicting decisions in courts in four states involving legislation of this type. Unless this court takes jurisdiction of the case at bar and lends some element of sanction and finality to one or the other line of decisions, great unrest and confusion will remain in the retail gasoline industry. Appellants earnestly pray that the Supreme Court of the United States take jurisdiction of the above matter and reverse the decision of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

Respectfully submitted,

EDWARD S. SHATTUCK,
Counsel for Petitioners

GUTHRIE, DARLING & SHATTUCK
SALISBURY & KNUDSON,
Of Counsel

APPENDIX "A"

SUPREME COURT OF CALIFORNIA, IN BANK

SERVE YOURSELF GASOLINE STATIONS ASSN., INC., ET AL.,

v.

BROCK ET AL.

L. A. 21968.

Oct. 31, 1952.

Action by owners and operators of self service gasoline stations against Director of the Department of Agriculture for judgment declaring that provisions of Business and Professions Code regulating price advertising on or near gasoline stations were unconstitutional and inapplicable to plaintiff's price signs. The Superior Court, Los Angeles County, Julius V. Patrosso, J., rendered judgment for defendant, and plaintiffs appealed. The Supreme Court, Spence, J., held that although the right to advertise is a property right, the requirement of full disclosure of price and brand name was a reasonable method of regulating gasoline advertising, and statutes requiring that gasoline price signs set forth in detail and in lettering as large as other lettering thereon the total price of the gasoline including tax and grade have a reasonable and substantial relation to the legitimate objective of the police power.

Judgment affirmed.

Prior opinion, 211 P.2d 593.

1. Constitutional Law—48, 81

In testing propriety of legislation as an exercise of the police power, the court is limited to determining whether the subject of the legislation is within the state's power, and, if so, whether means adopted to accomplish the result are reasonably designed for that purpose and have a real and substantial relation to the objects sought to be attained, and it must be presumed at the outset that the Legislature acted within its power.

2. Constitutional Law—48

The burden is upon those attacking a statute to make a showing that the statute is unconstitutional.

3. Trade-Marks and Trade-Names and Unfair Competition —68(2.13)

Primary purpose of legislation regulating gasoline service stations price signs was the prevention of misleading advertising. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

4. Trade-Marks and Trade-Names and Unfair Competition —68(2.1)

The prevention of misleading advertising is a purpose which is a proper subject for the exercise of the police power.

5. Constitutional Law—81

Although the Legislature may be denied the power to destroy a given right, it has the authority to regulate its exercise.

6. Trade-Marks and Trade-Names and Unfair Competition —68(2.13)

Legislation regulating gasoline service station price signs did not deal with price-fixing and did not affect the ultimate right to advertise price. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

7. Trade-Marks and Trade-Names and Unfair Competition —68(2.2)

Although right to advertise is a property right, the requirement of full disclosure of price and brand name is a reasonable method of regulating gasoline advertising, and statutes requiring that gasoline price signs set forth in detail and in lettering large as other lettering thereon, the total price of the gasoline, including tax and grade, have a real and substantial relation to the legitimate objectives of the police power. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

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8. Constitutional Law—296(1)

Trade-Marks and Trade-Names and Unfair Competition —68(2.2)

Statute requiring that gasoline price signs set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade, did not become oppressive or confiscatory by reason of fact that it might be more costly to conform to its requirements. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

9. Constitutional Law—70(3)

In considering whether statute requiring that gasoline price signs set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade, was constitutional, Supreme Court could not consider contention that the statute represented an arbitrary attempt to eliminate competition in the retail selling of gasoline. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

10. Constitutional Law—70(3)

It is not the function of the Supreme Court to search for motive in testing the constitutionality of a statute.

11. Trade-Marks and Trade-Names and Unfair Competition —68(2.2)

The Legislature being, in the first instance, the judge of what is necessary for public welfare, a statute regulating gasoline price signs could not be considered invalid in absence of showing of arbitrary interference with property rights or of the lack of a substantial relation between the means and a legitimate subject for regulation. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

12. Statutes—76(1)

The question whether a general law can be made applicable is one for the Legislature to be determined in the light of the evil intended to be avoided. Const. art. 4, § 25, subd. 33.

13. Constitutional Law—45

The determination of the Legislature as to whether a general law can be made applicable cannot be interfered with by the Supreme Court unless the disregard of the constitutional requirement is clear and palpable. Const. art. 4, § 25, subd. 33.

14. Statutes—76(1)

Provision of Business and Professions Code prohibiting false and misleading advertising in general could not be applied to require a full disclosure of price or brand name of gasoline offered for sale, and, hence, statute regulating gasoline price signs was not a special law, violative of constitution as unnecessary because a general law could be applicable. Business and Professions Code, §§ 17500, 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

15. Statutes—77(1)

The constitutional prohibition against special legislation does not preclude legislative classification, but only requires that the classification be reasonable. Const. art. 4, § 25, subd. 33.

16. Statutes—77(1)

The application of legislation regulating advertising signs to all persons engaged in the business of selling gasoline constituted a reasonable classification within the constitutional limitation upon special legislation. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

17. Constitutional Law—48

In considering the validity as special legislation of statutes regulating use of advertising signs by persons engaged in business of selling gasoline, it would be presumed that the Legislature had made a careful investigation in the field and that it had properly determined that the interests of the public required such regulation. Business and Professions Code, §§ 20880, 20882, 20883-20886; Const. art. 4, § 25, subd. 33.

Guthrie, Darling & Shattuck, Milo V. Olson, Edward S.

Shattuck and Salisbury & Knudson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and John F. Hassler, Jr., *Deputy Atty. Gen., for respondents.*

SPENCE, *Justice:*

Plaintiffs and intervenors, owners and operators of self service gasoline stations, appeal from a judgment declaring that sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code, regulating price advertising on or near gasoline stations, are constitutional and are applicable to plaintiffs' price signs.

Appellants contend that the sections in question involve an improper exercise of the police power, depriving them of their property without due process of law. It is further contended that these sections violate Article IV, Section 25, subdivision 33 of the California Constitution in that they constitute a special law that is unnecessary because a general law, Bus. & Prof. Code § 17500, is and can be made applicable. We have concluded that this regulation of price advertising is a proper exercise of the police power and that the judgment must be affirmed.

The sections in question[1] require price signs, other than price signs on the gasoline dispensing apparatus, Bus. &

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[1] § 20880. "(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, 'save' a designated amount, or a designated amount per gallon, such as 'save 5 cents' or 'save 5 cents per gallon,' or using the expression 'off' a designated amount, such as '5 cents off' or '5 cents less,' or 'discount' of a given amount, such as '5 cents discount,' or otherwise using the words 'save,' 'off,' 'discount,' 'less,' 'below,' or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the

Prof. Code §§ 20820-20826, to set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade. Signs using the words "save," "off," "discount," "less," "below," or words of similar meaning are considered price signs. The signs employed by appellants and others in the business of owning or operating gasoline stations use thereon the words "Save," "Serve Yourself and Save," and "Save 5," followed by small lettered words "cents," "ways," "minutes," or minor

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same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter."

§ 20882. "All letters, figures or numerals used in designating the brand name or words 'no brand' in any advertising medium referred to in this article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral."

§ 20883. "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.'"

§ 20884. "The advertising medium referred to in this article shall not contain any other advertising matter whatsoever, except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words 'no brand.'"

§ 20885. "For the purpose of this article, fractions are considered one numeral."

§ 20886. "The numeral one or the letter 'I' need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used."

variations of the same. Many of said signs do not refer to the name nor state the price of the gasoline offered for sale.

[1, 2] In review legislation for the purpose of testing its propriety as an exercise of the police power, "[t]he power of the court is limited to determining whether the subject of the legislation is within the state's power, and, if so, to determine whether the means adopted to accomplish the results are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained." Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 456, 55 P.2d 177, 181. Furthermore, it must be presumed at the outset that the Legislature acted within its powers. Hart v. City of Beverly Hills, 11 Cal.2d 343, 348, 79 P.2d 1080. The burden is upon those attacking the statute to make a showing that the statute is unconstitutional.

[3, 4] With this brief statement of the governing principles, we turn to the legislation at hand. It is apparent upon its face that the primary purpose of this legislation is the prevention of misleading advertising, which purpose has long been deemed a proper subject for the exercise of the police power. Note, Am.Cas.1916 A, 900; 89 A.L.R. 1004; 2 Cal.Jur.2d 606; and 11 Am.Jur., Constitutional Law, § 283, p. 1043. See also Hart v. City of Beverly Hills, supra, 11 Cal.2d 343, 350, 79 P.2d 1080; In re Sidebotham, 12 Cal.2d 434, 436, 85 P.2d 453; and In re McNeal, 32 Cal.App.2d 391, 394, 89 P. 2d 1096.

[5, 6] The next step is the consideration of the means employed by the Legislature to reach this legitimate end. These involve primarily the requirement of full disclosure, a method approved in In re Sidebotham, supra, 12 Cal.2d 434, 436, 85 P.2d 453. To demonstrate the unconstitutionality of these statutes, appellants cite and rely upon a series of cases declaring statutes unconstitutional which prohibit all price advertising on or near gasoline stations except those signs of a limited size permitted on the pumps. Regal Oil Co. v. State, 123 N.J.L. 456, 10 A.2d 495; State v. Miller, 126 Conn. 373, 12 A.2d 192; and Levy v. City of Pontiac, 331 Mich. 100, 49 N.W.2d 80. But cf., Merit Oil Co. v. Director of Division of Necessaries of Life, 319 Mass. 301, 65 N.E.2d 529; People v. Arlen Service Stations, 284 N.Y. 340, 31 N.E.

2d 184; and State v. Hobson, Del., 83 A.2d 846. However, the legislation under consideration here differs substantially from that involved in the above cases. There the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited. Our statutes do not prohibit effective advertising in this sense. Rather, sections 20882 and 20883 of the Business and Professions Code encourage the same by establishing minimum requirements as to size of lettering on the signs, thereby making more certain that the passing motorist can read them. The difference is of significance. The ultimate right to advertise price is unaffected by our statutes. Although the Legislature may be denied the power to destroy a given right, the authority to regulate its exercise is recognized. See Hart v. City of Beverly Hills, supra, 11 Cal.2d 343, 350, 79 P.2d 1080, and cases cited therein.

The decision of the United States Supreme Court in Williams v. Standard Oil Co., 278 U. S. 235, 49 S.Ct. 115, 116, 73 L.Ed. 287, is not a barrier to this legislation. There it was held that a state could not fix the price of gasoline for the reason that the business of selling gasoline is not one "affected with a public interest." But regardless of the standard by which the validity of price-fixing legislation should be tested, Tyson & Brother United Theatre Ticket Offices v. Banton, 273 U.S. 418, 430, 47 S.Ct. 426, 71 L.Ed. 718; See Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L. Ed. 940; and Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, the statutes in question do not deal with price-fixing and the Williams case is not controlling here.

[7, 8] Although the right to advertise is a property right, People v. St. John, 108 Cal.App.Supp. 779, 288 P. 53, the requirement of full disclosure of price and brand name is a reasonable method of regulating gasoline advertising, and the statutes have a real and substantial relation to legitimate objectives of the police power. The law does not become oppressive or confiscatory by reason of the fact that it may be more costly to conform to its requirements.

[9, 10] Nor is there any merit in the contention that this legislation represents an arbitrary attempt to eliminate

competition in the retail selling of gasoline. It is not our function to search for motive in testing the constitutionality of a statute. Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224, 69, S.Ct. 550, 93 L.Ed. 632.

[11] There can be no doubt that many gasoline price signs are misleading. When a motorist on the highway sees a sign which states in large letters "Save 5" or "5 Off," he can reasonably assume that he will save 5 cents per gallon below the price of gasoline sold in conventional service stations. And when these words are followed by the words "minutes," "ways," or the like, in small letters, the signs are highly misleading. Appellants do not argue at great length that the regulation of such signs is a violation of due process. Rather, they argue that the statute would be unconstitutionally applied if enforced against the sign "Serve Yourself and Save." Brock v. Superior Court, 12 Cal.2d 605, 610, 86 P.2d 805. Respondents have indicated an intent to so enforce the statute. While it is generally true that the motorist can realize a saving in the self service type station, and that this sign is therefore literally true, we cannot agree that the application of the requirement of full disclosure of price and brand name will violate due process of law. The convenience to the motoring public in having the price per gallon plainly disclosed where there is a representation that a saving can be made may well have been a real consideration of the Legislature in enacting the statutes. The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation, we can not declare this legislation invalid.

The final contention that this statute violates Article IV, Section 25, subdivision 33 of the California Constitution is likewise without merit. This section states: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: In all other cases where a general law can be made applicable."

[12, 13] The question whether a general law can be made applicable is one for the Legislature, "to be determined in

the light of the evils intended to be avoided, and with its determination upon that question we may not interfere unless the disregard of the constitutional requirement is clear and palpable." People v. Mullender, 132 Cal. 217, 221, 64 P. 299, 301; Accord: Wheeler v. Herbert, 152 Cal. 224, 232, 92, P. 353; Matter of Petition of Burke, 160 Cal. 300, 302-303, 116 P. 755; and Ventura County Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 276-277, 295, P. 6. There is no disregard of the constitutional requirement here. To the contrary, it is apparent that section 17500 of the Business and Professions Code, which prohibits false or misleading advertising in general, could not be applied to require a full disclosure of price or brand name of gasoline offered for sale.

[14-17] The distinction between a general and a special law within the meaning of the Constitution has been stated as follows: "[A law] is general * * * when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction * * * [It is a special law] if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." City of Pasadena v. Stimson, 91 Cal. 238, 251-252, 27 P. 604, 607. It is therefore clear that the constitutional prohibition against special legislation does not preclude legislative classification, but only requires that the classification be reasonable. See People v. Western Fruit Growers, 22 Cal. 2d 494, 506, 140 P.2d 13, and case cited therein. Here, the legislation applies equally to all persons engaged in the business of selling gasoline. The classification is a reasonable one. Gasoline is a unique commodity in that few people, if any, can distinguish between grades or brands by the use of the senses. Unlike many other commodities, its sale is final in the sense that there is no practical way for the motorist to return or exchange the purchased commodity, if dissatisfied. Price and brand name are the principal factors in its sale, and therefore, advertising of these elements in a misleading manner is peculiarly subject to abuse. Furthermore, it must be presumed that the Legislature has made a careful

investigation in the field, and that it has properly determined that the interests of the public require this regulation. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 674, 8 P.2d 140 80 A.L.R. 1217. No showing to the contrary has been made.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., and McCOMB, J. pro tem., concur.

DOTY v. LACEY, et al.

Civ. 19022.

District Court of Appeals, Second District, Division 3, California

Action by employee of owner of oil field equipment which trucking company had contracted to load and move for injuries sustained when boom of crane furnished by independent contractor at trucking company's request collapsed while lifting a heavy piece of equipment. The Superior Court of Los Angeles County, Henry W. Willis, J., entered judgment on a directed verdict in favor of trucking company and independent contractor, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that the evidence required submission of case to jury on questions of whether operator of crane remained in general employment of independent contractor so that contractor would be liable for negligent operation of crane and whether trucking company's foreman on the job was also guilty of negligence which constituted a proximate cause of injury.

Judgment reversed.

1. Master and Servant—316(1)

Owner of mobile crane, which with operator and driver was hired by trucking company to load oil field equipment which trucking company had agreed with owner of equipment to load and move, was an "independent contractor" liable for negligent operation of crane, unless crane operator

became a special employee of owner of equipment. Labor Code, § 3353.

See publication Words and Phrases, for other judicial constructions and definitions of "Independent Contractor."

2. Master and Servant—330(1)

Where an employer lends the services of an employee to a hirer for operation of an instrumentality owned by employer to perform such work as hirer directs without, however, relinquishing to hirer the power to discharge such employee, the legal inference is that such employee as operator of the instrumentality remains, in absence of agreement to the contrary, the employee of owner of instrumentality alone in so far as the manner and method of operating the instrumentality is concerned, and owner and not hirer of the instrumentality is liable for negligence of such employee.

3. Master and Servant—330(1)

An inference exists, in absence of evidence to the contrary, that an employee remains in his general employment so long as by the services rendered another he is performing the business entrusted to him by general employer, and fact that general employer has permitted a division of control does not raise an inference that he has surrendered such control.

APPENDIX "B"

Business & Professions Code

§ 20880. (a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words "gasoline" or "motor fuel" and the trade name or brand of the gaso-

line or other motor vehicle fuel product advertised for sale by such advertising medium.

(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, "save" a designated amount, or a designated amount per gallon, such as "save 5 cents" or "save 5 cents per gallon," or using the expression "off" a designated amount, such as "5 cents off" or "5 cents less," or "discount" of a given amount, such as "5 cents discount," or otherwise using the words "save," "off," "discount," "less," "below," or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter.

§ 20882. All letters, figures or numerals used in designating the brand name or words "no brand" in any advertising medium referred to in this article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral.

§ 20883. All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words "no brand."

§ 20884. The advertising medium referred to in this article shall not contain any other advertising matter whatsoever except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words "no brand."

§ 20885. For the purpose of this article, fractions are considered one numeral.

§ 20886. The numeral one or the letter "1" need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used.

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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 757

FRANK DELAY, HARRY ARNOLD (TRUE NAME HENRY ARMEL), *Appellants*,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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District Attorney,
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Deputy District Attorney,
Of Counsel.

BLEED THROUGH POOR COPY

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COME Now the People of the State of California, Appellee herein, and file this their Statement Disclosing Matters and Grounds Making Against the Jurisdiction of This Court, as asserted by Appellants.

Appellants' *Statement as to Jurisdiction*, among other things declares: ". . . that the unconstitutionality of the statutes was first raised by demurrer to the complaint. The demurrer was overruled and the matter tried. After conviction, and on appeal to the above court, defendants-appellants' only two contentions were that the statutes were unconstitutional and were being unconstitutionally applied to these defendants in violation of the Fourteenth Amendment to the Federal *Constitution. The judgment of*

the court affirmed the conviction without written opinion, hence sustaining the validity of the statutes." (Emphasis added: Appellants' Statement of Jurisdiction, P. 2, lines 29-34; P. 3, lines 1-5.)

From the above statement it appears that the judgment was affirmed without a written opinion. The Judges of the Appellate Department shall not be required to write opinions in any case decided by them, but may do so whenever they deem it advisable or in the public interest. (App. Dept. Rule 6, 26 Cal. 2d P. 6.)

Where the highest court of the State delivers no opinion and it appears that the judgment "might" have rested upon a nonfederal ground, this court will not take jurisdiction to review the judgment, when the question of the existence of an adequate state ground is debatable. (*Stembridge* v. *Georgia* (1952), 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834.)

WHEREFORE, appellee respectfully submits that the above statement asserts sufficient grounds making against the jurisdiction of this court and that the accompanying motion to dismiss, or, in the alternative, the motion to affirm should be granted.

Respectfully submitted,

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FRANK J. MACKIN,
Assistant Attorney General.
Attorneys for Appellee.

S. ERNEST ROLL,
District Attorney,
JEREMIAH J. SULLIVAN,
Deputy District Attorney,
Of Counsel.

BLEED THROUGH POOR COPY

Motion to Dismiss and alternatively, if said motion be denied, Motion to Affirm

COME Now the People of the State of California, Appellee herein, and move the Court to dismiss the within appeal upon the following ground:

The assignment of errors are too general and do not set out separately and particularly each error asserted (U. S. Sup. Ct. Rule 9). The following are the asserted assignments of error.

The Superior Court of the State of California in and for the County of Los Angeles, Appellate Department, erred:

1. In holding that Sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California are valid and constitutional.

2. In holding that the named sections are not being unconstitutionally applied so as to deprive Appellants of their property without due process of law, when applied to a sign reading: "Serve Yourself and Save".

The first assignment of error does not set forth whether the error rested upon a federal or nonfederal ground, nor can it be ascertained wherein or for what reasons the court erred in holding the code sections valid.

The second assignment of error does not set forth whether the error rested upon a federal or nonfederal ground, nor can it be ascertained how or in what manner the court erred in holding that the code sections were not unconstitutionally applied so as to deprive the Appellants of their property without due process.

The assignments of errors are so general that they present no question for consideration and may be disregarded by the Court. (*Seaboard Airline Ry. Co.* v. *Watson* (1932), 287 U. S. 86.)

WHEREFORE, Appellee respectfully moves the Court to dismiss the appeal herein because no substantial constitutional question is presented.

In the event the aforesaid motion to dismiss be denied, Appellee further moves the Court to affirm the judgment of the Superior Court of the State of California in and for the County of Los Angeles Appellate Department, because the law and the rules of court pertaining to forms of assignment of errors are not complied with. (*Seaboard Air-line Ry. Co.* v. *Watson, supra.*)

WHEREFORE, Appellee respectfully moves the Court to affirm the judgment of the Superior Court.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,
FRANK J. MACKIN,
Assistant Attorney General,
Attorneys for Appellee.

S. ERNEST ROLL,
District Attorney,
JEREMIAH J. SULLIVAN,
Deputy District Attorney,
Of Counsel.

No. 676. SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC. ET AL. *v.* BROCK, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL. Appeal from the Supreme Court of California; and

No. 757. DELAY ET AL. *v.* CALIFORNIA. Appeal from the Superior Court in and for the County of Los Angeles, California. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Edward S. Shattuck* for appellants. *Edmund G. Brown*, Attorney General of California, and *Frank J. Mackin*, Assistant Attorney General, for appellees. *John F. Hassler*, Deputy Attorney General, was also of counsel for appellees in No. 676. Reported below: No. 676, 39 Cal. 2d 813, 249 P. 2d 545.